ST 01-14

Tax Type:

Sales Tax

Issue:

Statute of Limitations Application

DEPARTMENT OF REVENUE STATE OF ILLINOIS OFFICE OF ADMINISTRATIVE HEARINGS SPRINGFIELD, ILLINOIS

DEPARTMENT OF REVENUE STATE OF ILLINOIS) 99-ST-0000
STATE OF ILLINOIS) 0000-0000) CLAIMS FOR CREDIT
) CLAIMS FOR CREDIT
V.)
) Mimi Brin
ABC PRODUCTS, INC., d/b/a) Administrative Law Judge
XYZ COMPANY)

ORDER PURSUANT TO CROSS-MOTIONS FOR SUMMARY JUDGMENT

This cause comes on to be heard on cross motions for summary judgment filed by ABC Products, Inc. d/b/a XYZ COMPANY (hereinafter referred to as "ABC" or the "Taxpayer") and the Illinois Department of Revenue (hereinafter referred to as the "Department"). The matters at issue concern the Department's denial of claims for refund filed by the taxpayer for the periods of 11/90 and 12/90, and 1/91 through 4/92 by reason of taxpayer's failure to file these claims within the statutory limitations period.

The parties submitted a statement of uncontested facts in addition to their respective motions. Following an examination of the documents submitted in this cause, this matter is concluded in favor of the Department. In support of this determination, I make the following findings of fact and conclusions of law:

Uncontested Facts¹:

- 1. ABC Products, Inc. was an Illinois corporation that did business under the assumed name of XYZ COMPANY. Facts ¶ 1
- 2. Taxpayer engaged in the business of selling glass and mirror products to the public at retail. Facts \P 2
- 3. Taxpayer conducted retail business during the period of November 1990 through April 1992 (hereinafter referred to as the "Tax Period"). Facts ¶ 3
- 4. Taxpayer made the following payments to the Department as remittance for its sales tax liability:

Check No.	<u>Amount</u>	Date of Check	Sales Tax Period Covered
1179	\$1336.80 ²	12/31/90	11/90
1295	690.52^{3}	2/13/91	10/25/90-12/22/90
1550	812.49	2/27/91	1/91
1697	560.83	4/29/91	2/91
2159	936.02	11/19/91	3/91
2160	1339.35	11/19/91	4/91
2161	915.90	11/19/91	5/91
2162	1055.27	11/19/91	6/91
2163	799.00	11/19/91	7/91
2459	908.00	4/21/92	8/91-12/914
2460	1092.00	4/21/92	8/92-12/92 ⁵
Facts ¶ 4			

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¹ These facts are taken from the Statement of Uncontested Facts (hereinafter referred to as "Facts") submitted by the parties.

² This check was cashed by the Department in the amount of \$1336.00.

³ This check bore the footnote "IL-501" and was therefore applied by the Department to the taxpayer's withholding tax liabilities.

⁴ The Department applied this payment to the period 2/91 through 7/91.

⁵ The Department applied this payment to the periods 8/91 and 9/91. Footnotes to Facts ¶ 4

- 5. Taxpayer closed its operations in April 1992 without remitting any additional sales tax payments for the periods January 1992 through April 1992. Facts ¶ 5
- 6. Taxpayer remitted \$9754.86 for its sales tax liability for the tax period. Facts ¶ 6; fn 5
- 7. During May 1993, taxpayer submitted additional ST-1 sales tax returns concerning its operations during the tax period, reflecting additional sales tax liability it believed it owed. Facts ¶ 7
- 8. On October 5, 1994, JOHN DOE (hereinafter referred to as "DOE") and one of taxpayer's accountants met with a Department employee to discuss taxpayer's sales tax liabilities. Facts ¶ 8
- 9. On November 16, 1994, the accountant submitted additional ST-1's further refining the amount of sales tax liability owed by the taxpayer. Facts ¶ 9
- 10. On February 1, 1995, the Department issued a Notice of Penalty Liability (hereinafter referred to as the "NPL") to DOE in respect to the taxpayer's claimed additional sales tax liability in the following amounts: Tax: \$8300.00 Penalties: \$1546.00 Interest: \$3303.28 Facts ¶ 10
- 11. DOE did not file a formal protest to the NPL. Facts ¶ 11
- 12. On October 27, 1995 the Department issued a 1002(d) Notice of Deficiency (hereinafter referred to as the "NOD") to DOE in respect to taxpayer's withholding tax liability in the amount of \$3376.00 for the period of 3Q91 through 2Q92. Facts ¶ 12

- 13. DOE did not file a formal protest to the NOD. Facts ¶ 13
- 14. During the period of August 1995 through April 1997, DOE paid an aggregate total of \$9,855.96 in respect to the February 1, 1995 NPL. Facts ¶ 15
- On April 7, 1997, DOE wrote to Priepot for the purpose of advising the Department that (i) the actual tax liability of the taxpayer in respect to sales taxes had been computed, and (ii) payments in excess of the taxpayer's sales tax liability had been paid. Facts ¶ 17
- 16. The actual sales records of taxpayer indicate that the actual sales tax liabilities in respect of product sales were as follows:

Period Covered	Actual Sales Tax Due
10/25/90-12/22/90	\$ 1,118.11
12/23/90-12/29/91	9,831.04
12/30/91-4/26/92	<u>2,283.78</u>
Total Sales Taxes Due	\$13,232.93
Facts ¶ 18	

- 17. In 1998, DOE filed a petition with the Board of Appeals. On June 5, 1998, the Board entered an order waiving interest and penalties assessed in the NPL, conditioned upon DOE and/or the taxpayer paying the sum of \$7,234.38, representing the balance of the tax liability on the NPL along with the balance due on the NOD issued to DOE. Facts ¶ 19
- 18. On July 2, 1998, DOE paid the Department \$7,234.38 by bank cashier's check. Facts ¶ 20
- 19. The aggregate actual tax liability of the taxpayer in respect of sales taxes was \$13,232.93, based upon the taxpayer's records. The following

payments were by the taxpayer and DOE in respect of the taxpayer's sales tax liability:

Payments made between 12/90 and 4/92 \$ 10,446.18 Payments made by DOE after Board of Appeals Total Payments \$ 27,536.52 Facts \P 21

- 20. The total taxes assessed under the NPL were \$8,300.00. The total payments made by DOE in respect of the NPL were \$17,120.34. Facts ¶ 22
- 21. On June 30, 1999, DOE submitted forms ST-1-X requesting refunds for the periods 11/90 and 12/90. Facts ¶ 23 On August 24, 1999, the Department issued a Notice of Tentative Denial of Claim for these periods. Facts ¶ 24
- 22. On September 10, 1999, DOE submitted forms ST-1-X requesting refunds for the period 1/91 through 4/92. Facts ¶ 25 On December 3, 1999, the Department issued a Notice of Tentative Denial of Claim for Sales Tax (form MTC-29) for this period. Facts ¶ 26
- 23. In a letter dated December 17, 1999, DOE, through counsel, protested "the decision of the Department of Revenue denying Mr. DOE's request for a refund of sales tax overpayments in respect of CPI." Facts ¶ 27

Conclusions of Law:

ABC filed a number of claims for refund concerning its Retailers' Occupation Tax (commonly referred to as "sales" tax) liabilities for the tax periods 11/90 through 4/92. The first claims request refunds for the periods 11/90 and 12/90. The

Department denied these claims on August 24, 1999 asserting that the taxpayer failed to file them within the statutory limitations period. On September 10, 1999, ABC filed additional claims requesting refunds for the periods 1/91 through 4/92. These claims were denied by the Department in December, 1999, again based upon the Department's assertion that the taxpayer failed to file them within the statutory limitations period.

Taxpayer's motion has two premises: Initially, it avers that JOHN DOE, as a principal of ABC, was issued a Notice of Penalty Liability on February 1, 1995 asserting a penalty against him, personally, based upon taxpayer's unpaid sales tax liability. DOE did not file a formal protest and request for hearing on this NPL, as provided by statute. Rather, he made payments toward the liability in 1996 and 1997, and, following his petition for relief to the Board of Appeals in 1998, DOE paid his remaining NPL liability, on July 2, 1998, in an amount compromised by the Board. Similarly, the Department issued a 1002(d) Notice of Deficiency to DOE, personally, based upon taxpayer's withholding tax liability. Again, he did not file a formal protest to this NOD, but, rather, paid his remaining liability based upon a compromised amount following his 1998 petition to the Board of Appeals.

Taxpayer argues that since there is no question that the taxpayer's pertinent tax liabilities were overpaid, it is not relevant that DOE did not protest his NPL and NOD⁶, which became final by operation of law. Further, taxpayer argues that DOE had a continuing dialogue with the Department whereby he challenged the accuracy of the

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⁶ I note that the parties discuss in their motions both the NPL and the 1002(d) NOD issued to DOE. However, they stipulate that the claims at issue were filed on forms ST-1-X, which are for sales and use taxes, and not for withholding taxes for which the NOD issued. Facts ¶¶23, 25 The parties further stipulate that the protest filed concerned the Department's denial of "Mr. DOE's request for a refund of sales tax overpayments in respect of CPI". Facts ¶ 27 There is no stipulation whereby ABC challenges the withholding tax amounts assessed or paid. As a result, I only address the claims as they were filed for ABC's sales tax liabilities.

assessments made by the Department, and, thus, the Department was on notice that the taxpayer timely challenged its tax liability. Therefore, any statute of limitations was tolled as a result of taxpayer's ongoing challenge to its assessed tax liability. Taxpayer provides no legal basis for its averments.

The Department's motion argues that there is a statutory three year from payment limitations period within which a taxpayer must file a claim for refund or credit. The Department further states that no claim is permitted when paid in liquidation of a finalized assessment. The Department avers that in this matter, any monies paid within that three year limitations period were paid pursuant to the NPL and NOD that had become final by operation of law. As a result, by statutory mandate, any claims for refund or credit are prohibited. As authority for its positions, the Department relies on particular statutory provisions and the Illinois appellate case <u>W.L. Miller Co. v. Zehnder</u>, 315 Ill. App.3d 799 (4th Dist. 2000).

I conclude that the Department's arguments are legally correct. ABC, a retailer, has its claims for credit or refund governed by sections 6, 6a and 6b of the Retailers' Occupation Tax Act (35 ILCS 120/1 et seq). 35 ILCS 120/6, 120/6a, 120/6b Section 6a provides, *inter alia*, that a claim for credit or refund "shall be prepared and filed upon forms provided by the Department" and "shall be considered to have been filed with the Department on the date upon which it is received by the Department." 35 ILCS 120/6a

Section 6 sets forth the time period during which a claim must be filed. Specifically:

However, as to any claim for credit or refund filed with the Department on and after each January 1 and July 1 no amount of tax or penalty or interest erroneously paid (either in total or partial liquidation of a tax or penalty or amount of interest under

this Act) more than 3 years prior to such January 1 and July 1, respectively, shall be credited or refunded, except that if both the Department and the taxpayer have agreed to any extension of time to issue a notice of tax liability as provided in Section 4 of this Act, such claim may be filed at any time prior to the expiration of the period agreed upon.

35 **ILCS** 120/6

The parties stipulate that for the claims periods of 11/90 and 12/90, ABC remitted its tax liabilities by checks dated 12/31/90 and 2/13/91. Facts ¶ 4 Since there is no stipulation that the parties agreed to extend the limitations period, under the plain reading of section 6, ABC was mandated to file its claims for these months no later than 12/31/93 and 6/30/94. Therefore, its claims, filed on June 30, 1999, were outside of the statutory limitations period.

Likewise, by 12/92, ABC concluded making payments on its sales tax liabilities for the claims periods of 1/91 through and 4/92 (Facts ¶ 4) although it filed more tax returns for all of the claims periods in May of 1993 and November 1994. Facts ¶¶ 7, 9 No remittances accompanied these returns, although the parties stipulate that these returns either showed additional sales tax liability (Facts ¶ 7) or refined ABC's heretofore admitted liability. Facts ¶ 9 None of these additional returns requested credits or refunds.⁷ Therefore, its claims for refund for these periods, filed September 10, 1999, were outside of the statutorily provided for limitations period.

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⁷ The parties stipulate that these subsequent returns were on form ST-1 Sales and Use Tax Return. The claims were filed on form ST-1-X Amended Sales and Use Tax Return, which is the Department form specific to claims for sales and use taxes refund and credit. Fact ¶ 7 specifically states that the May 1993 ST-1's reflected additional tax liability. Fact ¶ 9 states that the returns filed by ABC in November 1994 were on form ST-1 "further refining the amount of sales tax liability owed by the Taxpayer". The parties also stipulate that it was not until April 7, 1997, that DOE advised the Department, by a letter to a Department employee, of ABC's actual sales tax liability and that payments in excess of that liability were made. Facts ¶ 17 I conclude, therefore, that none of the returns filed in May 1993 and November 1994 reflected any overpayments by ABC.

This determination is not altered by the fact that DOE, personally, made payments to the Department that bear on ABC's tax liabilities. On February 1, 1995, the Department issued a Notice of Penalty Liability to DOE. This liability issued according to section 452½ of the Retailers' Occupation Tax Act. That statutory provision provides, in pertinent part:

§ 13½. Any officer or employee of any corporation subject to the provisions of the Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who wilfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon;

Ill. Rev. Stat. ch. 120, par. 452½8

While the penalty assessed against DOE is based upon the tax owed by the corporation, it is without question a separate and distinct liability against an individual. This liability is controlled by its own statutory limitations period and procedural obligations. 35 ILCS 735/3-7 It is clear that a protest to the NPL must be timely filed (id. at (b)) and it is further clear that without protest, the assessed penalty becomes final against the individual, as a matter of law, 60 days following its issuance. Id. (incorporating 35 ILCS 120/4, 120/5,) Enforcement and collection of these personal

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⁸ Pursuant to <u>Sweis v. Sweet</u>, 269 Ill. App.3d 1 (1st Dist. 1995), the pertinent personal penalty liability statute is the one in effect at the time the underlying corporate liability arose. See also 35 **ILCS** 735/3-9 (b) ("Penalties shall imposed at the rate and in the manner in effect at the time the tax liability became due.") ABC's tax liabilities arose between November 1991 through April 1992. The statutory provision at these times was found in \$13½ of the ROTA (<u>Ill. Rev. Stat.</u> ch. 120, par. 452½) This specific provision was repealed and replaced, as of January 1, 1994, by the personal liability penalty provision in §3-7 of the Uniform Penalty and Interest Act, 35 **ILCS** 735/3-7. For purposes of this proceeding, the language of the current provision is identical to that in § 13½. As a matter of convenience, I cite to the current provision in this recommendation.

penalty liabilities are also especially provided for by statute. 35 **ILCS** 735/3-7⁹ Consequently, when DOE failed to protest the NPL within 60 days, the liability assessed therein became final and became an enforceable, collectible tax liability against him, personally.

Claims for refund are governed by § 6 of the ROTA, which provides, in relevant part:

No claim may be allowed for any amount paid to the Department, whether paid voluntarily or involuntarily, if paid in total or partial liquidation of an assessment which had become final before the claim for credit or refund to recover the amount so paid is filed with the Department....

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⁹ The same applies to the NOD issued against DOE in October, 1995 based upon ABC's withholding tax liability. This assessment is authorized by § 1002(d) of the Illinois Income Tax Act, 35 **ILCS** 5/1002(d), which specifically provides for the penalty as imposed by § 3-7 of the Uniform Penalty and Interest Act, the same provision as applies to the NTL, discussed above. § 1002(d) penalty assessments have, for these instant purposes, the same protest periods.

By operation of law, therefore, ABC's claims for refund are made outside the statutory limitations period, and the Department correctly denied them. However, ABC also argues that its "course of conduct" commencing in 1994 and "continuing thereafter" placed the Department on notice that DOE believed the tax assessment was incorrect and that by his actions, the taxpayer put the Department on notice that it challenged the accuracy of the assessment. As a result, avers taxpayer, any limitations period regarding the "February 1, 1995 Notice of Assessment" was tolled.

Taxpayer discontinued operations in April, 1992. Facts ¶ 5 Although it continued filing sales tax returns regarding its concluded business activities in May 1993 and November 1994 (Facts ¶ 7, 9), and met with a Department employee to discuss its sales tax liabilities in October 1994 (Facts ¶ 8) there is no stipulation that ABC complained at those times that any sales taxes were overstated. In fact, taxpayer's returns filed in November, 1994 refined the amount of sales tax it understood was due (Facts ¶ 9) and the NPL that issued against DOE in February 1995 reflected the additional taxes ABC reported. Facts ¶ 10 Contrary to taxpayer's averments in its motion, it was not until April 7, 1997, that DOE wrote to the Department "advising" it of the actual sales tax owed by ABC and further advising that excess payments had been made. Facts ¶ 17 By that date, the claims limitations period for payments made by ABC had passed, and the NPL had become final by operation of law. Thus, there were no limitations periods to toll.

 $^{^{10}}$ I understand this reference to be to the NPL issued against DOE as stipulated to. Facts \P 10

Although the Department does not disagree that more monies have been paid to the Department then were due for ABC's sales tax liability for the period November 1990 through April 1992, the Department correctly relies on the case of W.L. Miller Company v. Zehnder, 315 Ill. App.3d 799 (4th Dist. 2000) to belie taxpaver's averment that its communications with the Department prior to the filing of the claims on the prescribed forms in any way tolled the limitations period. In the Miller case, the taxpayer wrote a letter to the Department in August, 1991 wherein it disagreed with the Department's interpretation of a particular exemption, and wherein it stated that the monies it enclosed resulting from an audit assessing specific items of tangible personal property was being paid under protest. Miller did not file a formal claim for credit or refund concerning some of the items assessed and paid for until May, 1996. Miller averred that the 1991 letter tolled the running of the statute of limitations on the items paid for at that time. Even though the Department did not quarrel with the fact that the monies claimed were correct (id. at 806), it argued that the statute of limitations barred the credit or refund. The Miller court agreed, stating that whereas the statute provides for the filing of a claim for credit "upon a form prescribed and furnished by the Department" (citations omitted) (id.), to allow Miller's letter to have the same legal effect as a claim properly filed would render as meaningless, the statutory filing procedures. <u>Id</u>. It declined to so hold. <u>Id</u>. The Miller court further determined that the merits of a claim are irrelevant when the claim is not filed within the statute of limitations. Id. See also Dow Chemical Co. v. Department of Revenue, 224 Ill. App.3d 263 (1st Dist. 1991) (although taxpayer overpaid liability under Income Tax Act, claim for refund barred by statute of limitations when taxpayer failed to file a claim within limitations period)

WHEREFORE, for the reasons articulated about	ove, it is ordered that the Notices of
Tentative Denial of Claim at issue herein be finalized.	
6/25/01	
	Mimi Brin Administrative Law Judge